Supreme Court, U.S.
FILED
06-660 NOV 8 - 2006
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No.

In the

Supreme Court of the United States

LEISURE TIME ENTERTAINMENT, INC.,

Petitioner,

v.

CAL VISTA INTERNATIONAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In determining a claim of lost profits arising from a breach of contract for the distribution of more than 250 films, should the measure of damages be based upon the plaintiff's *own* documented sales history — before and after the breach — or by *estimating* damages based upon another company's sales records for different films?

Was it unreasonable and improper to grant more than one million dollars in attorneys' fees for services upon which the Respondent did not prevail, including three appeals in which its judgment was reversed?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Leisure Time Entertainment, Inc. has no parent company or subsidiaries, and there are no publicly held companies that own 10% or more of the corporation's stock.

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OPINIONS AND ORDERS BELOW

Because of the importance of the issues, arising from a contract dispute relating to more than 250 motion pictures licensed for foreign distribution by Respondent Cal Vista International, Ltd. from Petitioner Leisure Time Entertainment, Inc., this case made the distant journey between the Central District of California and the Court of Appeals for the Ninth Circuit on no less than four separate occasions.

(1) During the *first appeal*, the Ninth Circuit reversed an award of summary judgment to Cal Vista, and remanded for further findings of fact. *Leisure Time Entertainment, Inc. v. Cal Vista*, No. 94-56407, 79 F.3d 1153 (9th Cir. 1996) (Table) (Browning, Wallace & Farris, JJ.) (App. 1-4).[1]

(2) On the *second appeal*, the Court of Appeals reversed Cal Vista's copyright infringement award based upon lack of jurisdiction, since any copyright infringements occurred outside the United States. *Leisure Time Entertainment, Inc. v. Cal Vista*, No. 98-55294, 185 F.3d 867 (9th Cir. 1999) (Table) (Kozinski, Fernandez & Shubb, JJ.) (App. 11-13). The court did, however, remand for a determination of damages under Cal Vista's breach of contract claim.

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[1] Numbers preceded by "App." refer to pages in the attached Appendix. Numbers preceded by "ER." refer to the Excerpts of Record filed in the Ninth Circuit during the most recent appeal. Numbers preceded by "RT." indicate pages of the transcript from the trials and proceedings in the district court. "SER." followed by numbers refers to the Respondent's Supplemental Excerpts of Record filed in the Ninth Circuit.

(3) On a *third appeal*, Judges Alex Kozinski, Ronald M. Gould and Charles R. Breyer found that Cal Vista had already received a "healthy return" on its investment. The panel further found that the district court abused its discretion in granting Cal Vista more than $5 million in lost profit damages based upon a failure of proof. *Leisure Time Entertainment, Inc. v. Cal Vista*, No. 00-57005, 35 Fed. Appx. 565 (9th Cir. 2002) (unpublished) (App. 43-50). On July 17, 2002, the court clarified that its memorandum disposition did not preclude retrial and recalculation of damages. 41 Fed. Appx. 925 (9th Cir. 2002) (unpublished) (App. 51-52).

(4) On the *fourth appeal*, a panel sustained the district court's damage award, which was estimated based on the profits of a different film distribution company, without ever considering Cal Vista's actual sales history. This speculation resulted in a 450% recovery on Cal Vista's investment. *Leisure Time Entertainment, Inc. v. Cal Vista*, No. 04-56690, unpublished but available on WESTLAW as *Global Videos, Inc. v. Niekerk*, 2006 WL 1737413 (9th Cir. June 22, 2006) (Reinhardt, Trott & Wardlaw, JJ.) (App. 93-96).

(5) On August 10, 2006, Leisure Time's timely Petition for Rehearing and Rehearing *en Banc* was denied (App. 97-98).

(6) Then, on August 29, 2006, the Ninth Circuit *granted* Leisure Time's motion to stay the issuance of the mandate pending the filing of a petition for certiorari (App. 99-100).

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on June 22, 2006. A timely Petition for Rehearing and Rehearing *en Banc* was denied on August 10, 2006. The 90-day period for filing this petition expires on November 8, 2006. *See* Supreme Court Rule 30.1.

The jurisdiction of this Court to review the Ninth Circuit's ruling is invoked under 28 U.S.C. § 1254(1). The district court's subject matter jurisdiction was originally based on 15 U.S.C. § 1121, 28 U.S.C. § 1338(a), and 17 U.S.C. § 101, *et seq*. However, on July 2, 1999, the Ninth Circuit found that the district court lacked jurisdiction under the Copyright Act. Thus, on remand, the district court exercised jurisdiction over the remaining state law contract claim pursuant to 28 U.S.C. § 1367(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Civil Code § 3300 provides, in pertinent part, that the measure of damages for a breach of contract is an amount "which will compensate the party aggrieved for all the detriment proximately caused" by the breach. Similarly, California Civil Code § 3301 states, in relevant part, that "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." And, California Civil Code § 3358 provides, in part, "no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall be deprived of "life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case presents recurring issues of national import relating to the proper method of calculating damages in actions for breach of contract.[2] Petitioner Leisure Time produces adult home videocassettes sold throughout the world and specializes in the production of "compilation" films.[3] These compilations generally include scenes from Leisure Time's own features, as well as films purchased from other companies. Respondent Cal Vista distributes adult motion pictures in markets outside the United States.

The central sequence of events that frame the predominant issue in this case began back in 1988, and continued over a period of five years. Leisure Time produced 252 adult films, which it then licensed to Cal Vista for distribution overseas. Each individual licensing agreement usually covered a group of films that were recently created.[4] Cal Vista then entered into exclusive agreements with distributing companies in specific foreign territories for

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[2] According to statistics maintained by the Administrative Office of the United States Courts, *28,020 contract actions* were filed in the United States District Courts in 2005. *See www.uscourts.gov/judicialfactsfigures/Table404.pdf.*

[3] Compilations are full-length productions that are usually comprised of 48 discrete scenes excerpted from a vast database of features relating to a common theme. A compilation has no plot or storyline, and exists as nothing more than a collection of scenes.

[4] Cal Vista only paid between $1,500 and $2,500 per film, for a total of approximately $600,000 (A. 49).

set periods of time. Furthermore, it required licensees to pay a fixed fee, in advance, for seven years.[5] Cal Vista maintained separate sales records for each film that it re-licensed (ER. 780.30-780.281).

Leisure Time specifically retained all rights to its features in the United States and believed that it also had the right to make compilations from the features that it licensed to Cal Vista. As a consequence, in the middle of 1990 — *after Cal Vista had already distributed more than half of the features* — Leisure Time began distributing compilations abroad that, in some cases, included scenes from the 252 features (App. 45).

Cal Vista eventually sued Leisure Time in the Central District of California for copyright infringement and breach of contract.[6] Unable to show that its profits actually declined because of the circulation of compilations, Cal Vista, instead, endeavored to establish a loss of profits based upon another company's profits from its distribution of entirely different feature films.

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[5] Because Cal Vista got its money up front, its profits remained the same regardless of whether or not a particular feature was profitable in the licensed territory (App. 45).

[6] Leisure Time initially commenced a copyright action after Cal Vista made its own compilations exclusively from Leisure Time's features. On August 10, 1994, the district court (Pfaelzer, J.) granted Cal Vista's motion for summary judgment, which the Court of Appeals vacated (App. 2). Following the remand, six years after the distribution of compilations, and two years after the case was initiated, Cal Vista decided to counterclaim, urging, for the first time, that Leisure Time's compilations interfered with its profits from licensing the features.

Therefore, rather than consider Cal Vista's own sales history — detailing its profits before and after the breach — Cal Vista relied exclusively on the testimony of David Kravis, of Coastline Film, Inc., who claimed that the 252 features were comparable to 23 films that he hand-selected from his own vast library of adult features (App. 44).[7]

Mr. Kravis was permitted to speculate that the features should have earned, collectively, $6,300,000, even though Cal Vista's own records reveal that the features it actually licensed before the breach earned considerably less. The district court (Pfaelzer, J.) adopted Mr. Kravis' *estimate* of damages and then reduced the amount by the total revenue Cal Vista earned from licensing the features to arrive at an award of $5,230,658 in damages (App. 31).

The Ninth Circuit vacated the judgment and stressed that there was insufficient evidence that Leisure Time's compilations were the proximate cause of any damages. The court also concluded that Cal Vista had already received a "healthy return" of $1,069,342 for its sales both before and after the breach (App. 49). Furthermore,

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[7] As a good friend of Cal Vista's principal, Mr. Kravis picked the 23 films from his collection of 400 to 500 features. John Stagliano, the most famous director of adult films, directed 13 of the features. Eleven films were ranked on charts of the Top 20 sellers or rentals (ER. 1183.15). The Kravis films had longer running times than those licensed by Cal Vista and cost, on average, *three times* more to make than the run-of-the-mill features produced by Leisure Time (App. 47). The 252 films enjoyed none of these special attributes.

the court stressed that David Kravis' opinion, that each feature would have generated $25,000 in revenue (regardless of the quality or nature of each film), was "unsupported by substantial evidence" (App. 44).

On remand, Cal Vista was forced to concede that its earnings on all the features that were licensed *before* the distribution of compilations in mid-1990 *could not have been affected* by the subsequent release of compilations (App. 67, 88). Therefore, Cal Vista's profits from those *129 features* provided the proper measure for calculating any damages that it sustained for the *123 features* that it received after Leisure Time's compilations entered the foreign markets.

Nevertheless, even though its entire sales ledger was in evidence, Cal Vista continued to rely on the sales record of the 23 Kravis films to establish its lost profits.[8] However, Kravis' films were produced by different studios, distributed by another production company with unique packaging and marketing schemes, were not always sold to the same distributors, and often went into different territories.

And, instead of comparing Cal Vista's profits from the 129 features licensed *before* the breach against its profits for the 123 features licensed *after* the breach, the district court (Snyder, J.) merely speculated, once again, what Cal Vista should have earned based on estimates relating to Kravis' profits from *his* 23 select films, which averaged $18,096 per film. As a consequence,

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[8] Cal Vista, whose principal has been in the business since *1968*, had already developed a considerable history through years of fixed-fee licensing agreements (RT. 6/24/04 at 112, 119).

the court awarded Cal Vista $1,703,867 in damages, plus prejudgment interest of approximately $720,000, as well as $1,334,882 in attorneys' fees (App. 92). This resulted in a total judgment of $3,758,750.

The Ninth Circuit affirmed the unprecedented judgment, which relied exclusively on a different company's experiences to estimate lost profits — rather than simply comparing the actual earnings of Cal Vista's features licensed *before* the release of compilations with the actual earnings of the films licensed *after* the circulation of compilations (App. 93-96). In fact, Cal Vista's sales were never considered at all!

The severe prejudice from this unconventional approach, which allows a district court to go outside the universe of the plaintiff's own sales experience and consider, instead, the profitability of a different company is manifest — especially where it involves the marketing of something as volatile and non-fungible as films. Significantly, a comparison of Cal Vista's actual sales history reveals that it received *more profits* in 1991 and 1992 — *after* the distribution of compilations — than it ever made in 1988, 1989 and 1990, *before* the offending compilations were distributed in mid-1990 (*see* RT. 7/20/00 at 83-85).[9]

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[9] Cal Vista only earned, on average, $5,530 per film in 1988 and $3,076 in 1989 from licensing the features *before* the breach (*see* ER. 780.30-780.33; RT. 7/20/00 at 83-85). Nevertheless, the court awarded Cal Vista $18,096 for every film licensed after the breach!

Fully recognizing the substantial and important issues presented by this case, the Ninth Circuit granted Leisure Time's motion to stay the issuance of the mandate pending the filing of a petition for certiorari (App. 99-100).[10]

REASONS FOR GRANTING CERTIORARI

I. THE NINTH CIRCUIT'S UNPRECEDENTED RULING, WHICH AUTHORIZES A DAMAGES CALCULATION FOR LOST PROFITS TO BE ESTIMATED THROUGH ANOTHER COMPANY'S SALES HISTORY RATHER THAN THE PLAINTIFF'S OWN EXPERIENCES, CONFLICTS WITH RULINGS OF THIS COURT, OTHER CIRCUIT AND STATE COURTS, AS WELL AS THE RECOMMENDATIONS OF LEGAL EXPERTS

The United States is the most litigious country in the world. Every year more than 250,000 civil cases are filed in the federal courts. And, most of those suits seek damages under some form of contract right. Damage awards are now spiraling out of control, which is a matter of considerable concern to the courts.

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[10] A party "may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must . . . show that the certiorari petition would present a substantial question and that there is good cause for a stay." F.R.A.P. 41(d)(2)(A).

Nevertheless, the Ninth Circuit's unprecedented rule, affirming that damages for lost profits based on a breach of contract can be estimated by projecting hypothetical profits, rather than utilizing the plaintiff's own books and records, is destined to authorize even greater speculative awards. However, this dangerous approach is in direct conflict with this Court's decision in *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544 (1941). In addition, it conflicts with rulings of other circuit and state courts that have addressed this issue. Thus, the scale of this issue can be measured by its impact on most litigation conducted throughout the entire country! All this lends enormous force to our greatest fears.

Concern over this recurring issue is also bound to be amplified because here the panel's opinion is in serious conflict with Ninth Circuit precedent as well as the Supreme Court of California, which acknowledge that the most accurate and reliable measure of establishing a company's lost profits is by examining its own sales history. *See, e.g.*, *Putnam v. Lower*, 236 F.2d 561, 571-72 (9th Cir. 1956); *Grupe v. Glick*, 26 Cal.2d 680, 692, 160 P.2d 832, 840 (Cal. 1945); *Restatement (Second) of Contracts* § 352.[11]

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[11] In *Putnam*, the court indicated that prospective profits calculated by considering the company's past profits as a "yardstick of prior profits" provides "definite knowledge of the parties' past productivity." *Id.*

Of course, the "existence of an intracircuit conflict" is sufficient to warrant review by this Court.[12] This is particularly so where that conflict arises out of the colossus of circuit courts. Moreover, if the decision of the Ninth Circuit is "one to which state laws and decisions are applicable, a conflict with, or a refusal to follow, a decision rendered by the highest court of the state may provide a ground for review of the court of appeals decision."[13]

The need for this Court's resolution of these important issues is heightened because, in the sensitive area of damage calculations, no judge should be permitted to substitute pure estimates based on the earnings of another company in place of the plaintiff's actual profits. In addition, because of the conflicting case law that has developed and the ever-mounting awards of damages in contract litigation, it is evident that this Court should give some definitive guidance as to what is the proper method of arriving at damages in such claims.

The common anxieties for litigants attached to a question of this sheer magnitude, involving as it does an aberrant and speculative method of calculating damages, warrants review by this Court. Furthermore, the corrosive force of this misuse of a methodology of computing lost profits is bound to have ramifications far beyond the confines of this case.

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[12] *See* Robert L. Stern & Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.6 (BNA Books 8th ed. 2002).

[13] Stern, *Supreme Court Practice* § 4.10.

Determination of an Existing Business's Lost Profits Requires Comparison of the Company's Profits Before and After the Breach of Contract

Where an existing business claims to have sustained damages in the midst of its operation, the truest measure of any lost profits is determined by comparing the company's profits *before* the breach with those earned *after* the breach. This practical approach stems from the fundamental principle that the past performance of a business provides the very best means to establish any damages. This is, of course, because the most direct measure of an established company's lost profits is found in its own sales history and tangible records.

Damages for lost profits have their "foundation in the past experience of the concern said to have suffered the loss."[14] Moreover, "damages for lost profits must be for profits actually lost, and those must be proven with reasonable certainty."[15] Therefore, to avoid improper speculation in damage awards, courts should not shut their eyes to the powerful light that the business's past experience casts on any alleged loss of future profits.

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[14] *See Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995).

[15] *Magna Weld Sales Co., Inc. v. Magna Alloys & Research Pty. Ltd.*, 545 F.2d 668, 672 (9th Cir. 1976); *McClaran v. Plastic Industries, Inc.*, 97 F.3d 347, 355 (9th Cir. 1996) (an "award of lost profits for an existing business is not speculative if the business's track record supplied a basis for the award").

Let the Records Speak for Themselves

On January 6, 1941, this Court issued a decision that stands guard over this whole body of law governing damage awards. In *Palmer v. Connecticut Ry. & Lighting Co.*, the Court underscored the extremely high "probative value of past experience" in assessing damages. 311 U.S. at 560. The Court also stressed that "[n]othing is more indicative" of the value of an existing entity than past earnings. *Id.* As a consequence, the Court concluded that proof of future profits by the evidence of past profits, in an established business, provides a reasonable basis for such a conclusion. 311 U.S. at 559. This rule should be reaffirmed in the face of the growing division.

Prior to the decision in this case, most circuit courts agreed that the best evidence of lost profits involves comparing the experience of the injured party's own business before and after the wrongdoing.[16] Similarly,

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[16] *See, e.g., Standard Machinery Co. v. Duncan Shaw Corp.*, 208 F.2d 61, 63 (1st Cir. 1954) ("[c]ertainly no authority need be cited for the . . . proposition that evidence of past profits from an established business provides a reasonable basis for estimating future profits from the business"); *Flexitized, Inc. v. National Flexitized Corp.*, 335 F.2d 774, 779 (2d Cir. 1964) (plaintiffs' evidence of their sales before and after the breach was "clearly acceptable proof tending to show the amount of lost profits"); *McBrayer v. Teckla, Inc.*, 496 F.2d 122, 127 (5th Cir. 1974) ("the profits the business has been making at a point not too remote prior to the breach are competent evidence of profits to be anticipated at a point not too remote after the breach"); *Wash Solutions, Inc. v. PDQ Mfg., Inc.*, 395 F.3d 888, 893 (8th Cir. 2005) ("expected future profits may be extrapolated with reasonable certainty from historical evidence of the income and expenses of the business prior to the damaging event").

the majority of state courts recognize that any assessment of lost profits requires *some* analysis of the company's profitability and history.[17]

Furthermore, the Ninth Circuit's recent approach conflicts with leading legal scholars and commentators, who stress that claims for damages resulting from a breached contract should be calculated based on evidence of actual losses reflected in the company's own books — rather than looking out to the records of an unrelated company to estimate damages.[18] Consideration of a different

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[17] *See, e.g., Bagley v. Smith*, 6 Seld. 489, 19 How. Pr. 1 (Sup. Ct. N.Y. Co. 1853) ("no man would undertake to form an opinion as to the prospective profits of a business without, in the first place, informing himself as to its past profits"); *Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. 1968) ("proof of the income and expenses of the business, for a reasonable time anterior to its interruption, with a consequent establishing of the net profits during the previous period, is indispensable"); *Clark v. Scott*, 258 Va. 296, 302, 520 S.E.2d 366, 370 (1999) (the "prior and subsequent record of the business's profits may be used to permit an intelligent and probable estimate of damages"); *Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 523, 780 S.W.2d 543, 546 (1989); *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 59 (Tenn. Ct. App. 2004). This list is illustrative only and by no means exhaustive.

[18] *See Restatement (Second) of Contracts* § 352 cmt. b (1981) ("[e]vidence of past performance will form the basis for a reasonable prediction as to the future"); 25 *C.J.S. Damages* § 281 (2006) ("evidence of past profits may be highly relevant"); 22 *Am. Jur. 2d Damages* § 760 (2006) ("[w]here a regularly established business is injured, the average profits that the business is then earning and has earned are competent proof as to the loss of profits").

company's experiences inevitably results in the very type of speculation and surmise that creates uncertainty and allows for excessive awards, such as this.[19]

Nevertheless, in affirming the district court's decision, the Ninth Circuit has now endorsed a rule whereby lost profits of an ongoing business may be estimated based solely upon the profits of an unrelated company with significantly different operations, rather than the history and profitability of the plaintiff! If such a radical rule, by the *largest circuit court in the nation*, is left uncorrected, it is destined to affect thousands of other cases in this exploding age of litigation.[20] The sheer scale of this issue warrants review by this Court.

Underscoring the importance of damage issues, this Court has recently granted certiorari in a number of cases that present similarly compelling questions. *See, e.g., Williams v. Phillip Morris USA*, 340 Or. 35, 127 P.3d 1165 (2006), *cert. granted*, 74 U.S.L.W. 3572 (U.S. May 30, 2006) (No. 05-1256) (review of determination of punitive damages). And, because of the critical role the calculation of damages plays in virtually all civil proceedings — both state and federal — this Court has

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[19] Plaintiffs have always been required to establish lost profits with reasonable certainty. *Palmer*, 311 U.S. at 558. Moreover, California Civil Code § 3301, which governs these proceedings and is typical of statutes across the nation, provides that "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." *See also McDonald v. John P. Scripps Newspaper*, 210 Cal. App. 3d 100, 104, 257 Cal. Rptr. 473 (2d Dist. 1989) (damages that "are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery").

[20] The panel's decision is available for public review through WESTLAW.

always expressed acute interest in cases that address this issue. Recently, the Court's interest has intensified. *See, e.g., Kansas v. Colorado*, 533 U.S. 1 (2001) (consideration of whether the method of calculating damages was proper relating to the difference in crop yields resulting from lack of water flow).

This Case Presents the Perfect Vehicle for Resolving the Recurring Questions Relating to Calculating Lost Profits

This case is uniquely suited to review the recurring issues relating to the proper method for calculating lost profits. Here, nearly half (129) of the 252 features were wholly unaffected by the breach because they were already locked into fixed-fee licensing agreements before any compilations were ever distributed abroad. As a consequence, Cal Vista's records relating to the profitability of those features provide the most accurate and reliable measure of what Cal Vista could expect to earn from the other half of its films, which were marketed in the very same manner to the same distributors.

What is so telling about Cal Vista's own records is that they detail that, on average, it earned the same or even more money from licensing the features *after* the distribution of compilations than it did before![21] The

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[21] A comparison of Cal Vista's actual sales history before the compilations were distributed with its subsequent sales history indicates that Cal Vista received more profits in 1991 and 1992 — after the distribution of compilations — than it ever made in 1988, 1989 and 1990, before any distribution of the offending compilations (*see* RT. 7/20/00 at 83-85). For example, in 1988 Cal Vista earned, on average, $5,530 per title. It averaged $3,076 in 1989; $3,386 in 1990; $5,481 in 1991; and $3,141 in 1992. *Id.* Thus, Cal Vista's profits *increased* — and certainly were not "lost" — with the distribution of compilations.

following chart makes glaringly obvious that Cal Vista truly sustained no damages at all and continued to license the features for the very same profits after compilations were distributed in mid-1990. These hard facts deserve heightened attention.

Cal Vista's average sales per film for 1988 and 1989 (before compilations)	Cal Vista's average sales per film for 1991 and 1992 (after compilations)	The district court's estimated award per film
$4,303	$4,311	$18,096

Despite this compelling proof, rather than give any consideration to Cal Vista's prior profits from licensing the very same catalog of features to its own distributors in the same territories, the court instead looked to the profits of *23 premium films* produced by a completely different company that were often marketed to different distributors in different territories.[22]

[22] The panel indicates that the "district court's comparison of the revenue garnered by similar adult films, in order to determine how much money Cal Vista's films would have produced absent the compilations, was a 'reasonable basis of computation' " (App. 95). But, it is patently unreasonable to look to the profitability of 23 choice films and the operating history of another company when Cal Vista's own sales records do not support a claim that it sustained any loss of profits!

The severe prejudice from this unique approach, which allows a district court to go outside of the universe of the plaintiff's own sales experience and consider, instead, the profitability of a much more successful venture, is manifest in this case. The court presumed that Cal Vista's features licensed after mid-1990, from the very same catalog, should have earned, on average, $18,096 as well. But, this is approximately *six times* what Cal Vista's features actually made in 1989 — *before* any compilations were distributed.

Faced with the dilemma that not a shred of evidence existed in the record to support this dramatic inflation of profits, Cal Vista was forced to resort to a speculative theory of damages. This error is especially acute where the panel concedes that the "question of causation was a close call" (App. 94).

The panel's decision authorizes plaintiffs to rely on estimated damages rather than their own experiences. But, where the profits of selected companies are used for comparison, this will be accompanied by all of the fallibilities associated with such a strategy. Therefore, this unprecedented decision is destined to engender further confusion in this important area of the law — particularly in a circuit where the distribution of films is most prevalent. And, courts will be unsure of how to cope with the consequences of this rule of damages.

Litigants who must endure excessive damage awards, based on a speculative theory of damages, suffer grievous wrongs and should be entitled to have this injustice corrected. This is especially true where, as here, such a lopsided award of theoretical damages has been imposed. The failure to utilize the logical and standard way of calculating lost profits — which considers the plaintiff's actual profits — cannot help but erode our confidence in the American system of justice.

The Ninth Circuit's new rule will open the door to all sorts of novel ways to estimate damages that are based on theory — not fact. And, these theories will only be limited by the ingenuity of an advocate's imagination. Counsel must now anticipate a variety of theoretical approaches to damages, which are highly speculative or based upon the conjecture of experts.

Defense attorneys will now have to investigate every conceivable form of recovery rather than one based on profits actually reflected in the plaintiff's books. Of course, the books and records of a company provide documentation that gives a sense of certainty and reliability to an award of damages that hypothesis does not. As recognized by Carl Sandburg, the "best witness is a written paper." Certainly, the more reasonable rule adopted by this Court in *Palmer*, more than 60 years ago, should be reinforced by this Court.[23]

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[23] The virtue of the singular and solitary "books and records" rule of damages, which always looks first to the plaintiff's records before reaching outside the record to consider other sources, is that it is finite. A defendant's liability for a breach of contract can be ascertained easily and fairly. It also only subjects a party to a damage claim that is documented by hard facts of actual loss — rather than speculated losses.

Now is the time for this Court to resolve this disruptive conflict of authority. The basic unfairness of the Ninth Circuit's excessive damage award adds to the appropriateness of granting certiorari in this case. The Court of Appeals' exceptional stance requires this Court to step in and settle this issue once and for all.

"Here There Be Dragons"

Ancient mapmakers, when they reached the end of the earth, as it was then known, wrote "Here There Be Dragons." This warning expressed a natural fear of the unexplored. For, in medieval times, the unfamiliar always instilled fear. Under the rule of the Ninth Circuit, there is no way to tell what lies beyond a claim for damages in an ordinary breach of contract suit if it is not based upon the plaintiff's books and records that reveal its actual profits and losses.

In a metaphorical sense, today, when defendants are forced to navigate through the turbulent seas of litigation, the dragons that lie deep in the darkness of pure hypothesis and speculation, embodied in the Ninth Circuit's rule, are very real indeed. For, as here, the dragons of excess — resulting in claimed lost profits of 450% for Cal Vista's investment — defy all logic and rationality. These damages ran off the edge of the map and subjected Leisure Time to the dark ambiguity that the ancient mapmakers feared so greatly.

Without resolution, this issue will continue to fester and generate conflicts across the nation. Since the issues have been so clearly drawn by the stark facts of this case, this matter is now ideally situated for final review by this Court.

II. THE MANY ERRORS IN THE JUDGMENT ARE SUFFICIENT TO WARRANT REVIEW AND CORRECTION BY THIS COURT PURSUANT TO ITS SUPERVISORY POWER

Certiorari review, under the Court's supervisory powers, is also warranted to avoid a gross miscarriage of justice because the Ninth Circuit's decision overlooked critical errors by the district court that are bound to have wide ranging consequences.[24] In addition to the fatally flawed speculation concerning lost profits, the court awarded Cal Vista $1,703,867, even though it already received a "healthy return" of $1,069,342 [a return of nearly 100%] from the low-cost feature films that it acquired for only $600,000.[25]

Second, since Cal Vista made a calculated business decision to license its features to foreign distributors for a flat fee, paid in advance, its profits were fixed and could not be affected by competing compilations in the licensed territories (App. 45). The primacy of this fact applies to all of Cal Vista's features — not just the 129 features that it received prior to mid-1990 before the distribution of compilations commenced. Nevertheless, the district court's judgment erroneously assumed that

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[24] Supreme Court Rule 10(a) provides, in part, that certiorari is warranted where the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court." Of course, the Court can accept cases for review "for no apparent reason other than error in the lower court decision." Stern, *Supreme Court Practice* § 4.17.

[25] Cal Vista obtained this extravagant and unjustified award even though the proof showed that it received all of the revenue that it could expect from these "bottom of the barrel, low quality, filler product" (SER. 149).

Cal Vista sustained damages for *all* features that it received after mid-1990 regardless of when and where compilations were distributed that may have contained scenes from those features (App. 73).[26]

Adopting the concession of Cal Vista's own expert, Judges Kozinski, Gould and Breyer previously held, in this case, that proximate cause for lost profits is established by proof that the illegal compilations were distributed in the same market, and at the same time, as the feature that is claimed to have been adversely affected (App. 47-48). Thus, Cal Vista's failure to prove that any compilation, containing scenes from a particular feature, was ever distributed in the same territory and at the same time as that specific feature, doomed its case for damages.

Finally, the unreasonable judgment should be reviewed where Cal Vista was awarded $1,334,882 in attorneys' fees even though a significant portion of its fees related to claims upon which it clearly did not prevail — including *three appeals* to the Ninth Circuit where its judgment was either reversed or vacated by the court! (App. 5, 13, 50).

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[26] It takes time to assemble and produce a compilation. And, significantly, the initial production and distribution of the compilations did not occur until two and a half years after Cal Vista received the first set of features in 1988. In many cases there was a one to two year time lapse between the date a compilation was released in the United States and when it was distributed abroad (RT. 7/20/00 at 72).

Moreover, Cal Vista obtained fees for wholly unsuccessful applications, such as its attempt to justify nearly $100,000 in expert witness costs based on authorities that this Court expressly reversed (ER. 1032.2-1032.3).[27] Counsel for Leisure Time was forced to research these issues and defend against erroneous claims. Nevertheless, Cal Vista was awarded a shocking wholesale award of more than one million dollars in attorneys' fees.

Our federal courts stand as bastions of fairness and justice. However, decisions, such as this, call radically into question our deepest assumptions regarding the proper functioning of the federal judiciary. As a consequence, the supervision by this Court is desperately needed in this case to ensure that right is done.

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[27] For example, counsel for Cal Vista cited to *United States v. Twin Falls*, 806 F.2d 862 (9th Cir. 1986) and *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227 (1964), to support its claim for expert witness costs, even though those authorities were overruled and expressly disapproved of by this Court in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

CONCLUSION

For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the Ninth Circuit's order in this case.

November 8, 2006

Respectfully submitted,

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